Attorney General
1275 WEST WASHINGTON
Phoenix, Arizona 85007
Robert K. Corbin

June 27, 1988

The Honorable Stephen D. Neely
Pima County Attorney
Civil Division
32 N. Stone, Suite 1500
Tucson, Arizona 85701-1412

Re: I88-072 (R88-059)

Dear Mr. Neely:

Pursuant to A.R.S. § 15-253(B) we have reviewed your April 26, 1988 opinion to the Assistant Superintendent of Catalina Foothills School District and concur with your conclusion that a public school district's provision of an interpreter for a deaf student, who chooses to attend a parochial school, violates the First Amendment of the Federal constitution and art. II, § 12 of the Arizona Constitution.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC:LSP:pnw

OFFICE OF THE
Pima County Attorney
Civil Division
32 N. STONE
SUITE 1500
Tucson, Arizona 85701-1412
(602) 622-6621

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

JAMES M. HOWARD
CHIEF DEPUTY

R88- 059
Stark
5/5/88

OPINION NO. 88- 04

TO: Terry Downey, Assistant Superintendent
Catalina Foothills School District

FROM: JoAnn Sheperd
Deputy County Attorney

DATE: April 26, 1988

RE: Request for Legal Opinion

QUESTION PRESENTED

You have requested a legal opinion as to whether the school district may provide the services of an interpreter for a deaf student if that student chooses to attend a parochial high school. You have also informed me that this high school is not the only suitable placement for this student, but is the one chosen by the student and his parents as offering the most desirable educational environment. In addition, the parents have agreed to pay for an interpreter's services during religious instruction classes.

ANSWER

See body of opinion.

DISCUSSION

I. The Education of the Handicapped Act.

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U.S.C. §1400 et seq., provides federal money to state and local agencies to assist in the education of handicapped children. This funding is conditioned upon each state's compliance with comprehensive goals and procedures.

In a 1982 opinion, the U. S. Supreme Court described the Act as:

OFFICE OF THE
Pima County Attorney
Civil Division
32 N. STONE
SUITE 1500
Tucson, Arizona 85701-1412
(602) 622-6621

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

JAMES M. HOWARD
CHIEF DEPUTY

R88- 059
Stark
5/5/88

OPINION NO. 88- 04

TO: Terry Downey, Assistant Superintendent
Catalina Foothills School District

FROM: JoAnn Sheperd
Deputy County Attorney

DATE: April 26, 1988

RE: Request for Legal Opinion

QUESTION PRESENTED

You have requested a legal opinion as to whether the school district may provide the services of an interpreter for a deaf student if that student chooses to attend a parochial high school. You have also informed me that this high school is not the only suitable placement for this student, but is the one chosen by the student and his parents as offering the most desirable educational environment. In addition, the parents have agreed to pay for an interpreter's services during religious instruction classes.

ANSWER

See body of opinion.

DISCUSSION

I. The Education of the Handicapped Act.

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U.S.C. §1400 et seq., provides federal money to state and local agencies to assist in the education of handicapped children. This funding is conditioned upon each state's compliance with comprehensive goals and procedures.

In a 1982 opinion, the U. S. Supreme Court described the Act as:

> (A)n ambitious federal effort to promote the education of handicapped children, ... passed in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out'.'

Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 179, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), quoting H.R. Rep. No. 94-332, p. 2 (1975) (H.R. Rep.).

Congress, by its statutory declaration of policy as set forth in 20 U.S.C. §241(a), recognized that not all handicapped children from educationally deprived areas attend public school and therefore it was "necessary to include eligible children attending private school among the beneficiaries of the Act." Wheeler v. Barrera, 417 U.S. 402, 405-406, 41 L.Ed.2d 159, 94 S.Ct. 2274 (1974). The Act therefore focuses on the identification and evaluation of all handicapped children and requires that participating state and local educational agencies provide necessary services, including a free and appropriate public education "tailored to the unique needs of the handicapped child," Rowley, 458 U.S. at 176.

Federal regulations promulgated in accordance with the Act address the issue of parental placement of handicapped children in private schools. 34 C.F.R. §300.403 provides in pertinent part:

> (a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.460.

34 C.F.R. §300.452 addresses the responsibilities of a "local educational agency", providing that:

> (a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

"Local educational agency" is defined in 20 U.S.C. §244(6)(B) as including:

> (A) public board of education. . . legally constituted within a State for either administrative control or direction of . . . public elementary or secondary schools in a . . . county . . . school district, or other political subdivision of a State. . .

"Related services" is defined in 34 C.F.R. §300.13 as:

> (a) (T)ransportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education...

The Act and its accompanying regulations do not expressly require that services be provided on the premises of a private school or, for that matter, on the premises of a public school; nor do they require a public agency to concede to parental wishes regarding specific programs and placement. The regulations do provide administrative procedures whereby parents are able to challenge services, programs and financial responsibility. See 34 C.F.R. §300.403(b).

II. Constitutional Interpretation of the Act

The U. S. Supreme Court has analyzed whether the provision of certain services by a public school district, pursuant to the Act, to a handicapped student attending a private parochial school constitutes a violation of the Establishment Clause of the First Amendment of the U. S. Constitution, which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

In constructing its analysis, the Court has examined the constitutionality of various remedial and enrichment programs implemented to provide assistance to elementary and secondary education students enrolled in nonpublic schools, applying the test first set down in Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745, 92 S.Ct. 2105 (1971). The Lemon test provides that in order for a statute to be upheld in the face of an Establishment Clause challenge, it must (1) have a secular purpose; (2) have a principal or primary effect that neither advances or inhibits religion; and (3) not foster an excessive entanglement of government with religion. Id. at 612, 613.

The Court recently applied this test in companion cases decided in 1985, both of which involved the constitutionality of publicly-financed educational programs provided to nonpublic school students. In the first case, Grand Rapids School District v. Ball, 473 U.S. 373, 87 L.Ed.2d 267, 105 S.Ct. 3216 (1985), the Court invalidated the provision of certain publicly-sponsored remedial and supplementary programs which were conducted on sites leased from and located on private school property, finding that the programs had the primary or principal effect of advancing religion. In the facts of that case, students moved between religious school instruction and remedial or supplementary classes, the latter two being taught by public school employees on the premises of the parochial school. The Court held that this program resulted in a "symbolic union of government and religion in one sectarian enterprise", constituting an impermissible effect under the Establishment Clause. Id. at 392.

In the companion case, Aguilar v. Felton, 473 U.S. 402, 87 L.Ed.2d 290, 105 S.Ct. 3232 (1984), the Court invalidated a program in which a city used federal monies to pay the salaries of public employees providing instruction to educationally deprived children in nonpublic schools, on the basis of excessive entanglement of government with religion.

In Meek v. Pittenger, 421 U.S. 349, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975), the Supreme Court considered the constitutionality of a law which authorized the State of Pennsylvania to loan public school textbooks to children attending nonpublic schools. The statute also authorized loans by the state of instructional materials and equipment, plus the provision of certain "auxiliary services", directly to the nonpublic schools. These "auxiliary services" included counseling, testing, psychological services, speech and hearing therapy and certain other related remedial services.

The Court invalidated the state's provision of instructional materials and equipment to nonpublic schools, even though the items were nonsectarian in nature, holding that when state aid:

> (F)lows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission ... (it) has the impermissible primary effect of advancing religion,

at 366.

It also prohibited the provision of the auxiliary services, which utilized public employees, as these employees,

> (A)re performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. (Emphasis added).

Id. at 371.

Arizona courts have not yet been confronted with the particular issue you have presented. However, Article 2, §12 of the Arizona Constitution provides:

> No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

The Arizona Attorney General concluded in Op.Atty.Gen. No. I80-62 that the rendering of special education services which are characterized as "therapeutic", or which involve teaching or counseling on parochial school premises, results in a violation of the Establishment Clause. The opinion cites Wolman v. Walter, 433 U.S. 229, 53 L.Ed.2d 714, 97 S.Ct. 2593 (1977), in which the Court examined various provisions of a state statute which allowed the expenditure of public funds for aid to nonpublic school students. The Court specifically addressed the issue of whether various services could be provided on the premises of parochial schools and concluded that while the provision of diagnostic services on-site is permissible, therapeutic service delivery on parochial school premises violates the Establishment Clause. Of particular significance is the distinction made by the Court between diagnostic and therapeutic services:

> First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between

> teacher and student or that between counselor and student.

Id. at 244.

Analogizing this holding to the issues your question has raised, it appears appropriate to characterize an interpreter as more akin to a therapist or a teacher than a diagnostician. The very nature of an interpreter's role requires that he or she "step into the shoes" of the teacher in order to convey all information disseminated in class to the hearing-impaired student. The interpreter therefore becomes "closely associated with the educational mission of the nonpublic school," as set forth in Wolman, supra.

Conclusion

Although federal and state law clearly require the provision of special education and certain related services to handicapped students attending nonpublic schools, it is equally clear that the provision of certain of these services pursuant to this mandate violates portions of both the United States and Arizona Constitutions. In light of the U. S. Supreme Court's holdings in Wolman and Meek, supra, excessive entanglement of state and church may well result if a publicly-funded interpreter provides a conduit for the transmission of sectarian views to a student attending a nonpublic parochial school, "in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." Meek, 421 U.S. at 371.

A copy of this opinion has been submitted to the Attorney General for his review, pursuant to A.R.S. §15-253(B).

Respectfully submitted,

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By: JoAnn Sheperd
JoAnn Sheperd
Deputy County Attorney

APPROVED:

David G. Dingeldine
Chief Civil Deputy County Attorney

CC: Robert Corbin, Esq.
Arizona Attorney General

Anita Lohr
County School Superintendent